

[2017] AACR 26
(Savic v Information Commissioner, Attorney General and Cabinet Office
[2016] UKUT 534 (AAC)
[2016] UKUT 535 (AAC))

Mr Justice Charles CP
Judge Peter Lane
Anne Chafer
30 November 2016

GI/2074/2015
GI/2075/2015

Freedom of Information Act 2000 – exempt information – Law Officer’s Advice – need to weigh competing public interests – neither confirmed nor denied response

The appellant made two Freedom of Information Act 2000 (FOIA) requests regarding the decision to take military action in Kosovo in 1999, one to the Attorney General’s Office (the AGO) for details of the legal advice given to the government and the other to the Cabinet Office (the CO) for the minutes of the relevant Cabinet meetings, inter-departmental memos and other records. The AGO’s initial response was neither to confirm nor deny (NCND) that it held such information. However, later it confirmed that it did, but that the information was being withheld on the basis that it was exempt information under section 35(1)(c), being Law Officer’s Advice. Following a complaint, the Information Commissioner upheld that response. Later the AGO also claimed that other exemptions applied in section 42(1), legal professional privilege (LPP), and in section 27(1), information prejudicial to the UK’s International Relations. The request to the CO was also refused on various grounds and the Information Commissioner rejected the applicant’s complaint. He held amongst other things that the CO was entitled to rely on the exemptions in sections 27(1)(a) to (d) concerning International Relations and in 42(1) regarding information it had confirmed it held and that it was entitled to rely on NCND in section 35(3) regarding Cabinet minutes. The appeals against the Information Commissioner’s decisions were transferred directly to the Upper Tribunal.

Held, dismissing the AGO appeal and upholding the CO appeal in part, that:

1. (*AGO decision*) there was an obvious link between the public interests underlying section 35(1)(c) and the exemption for Law Officers’ advice and section 42, the exemption for LPP. The factors identified by the courts in favour of the non-disclosure of LPP information provided powerful reasons for a refusal of a FOIA request, but there was not a right of non-disclosure in the FOIA context, and a fact sensitive weighing of the competing public interests must be carried out: *Department for Business Enterprise and Regulatory Reform (BERR) v O’Brien* [2009] EWHC 164 (QB) and *HM Treasury v the Information Commissioner* [2009] EWHC 1811 (Admin); [2010] 1 QB 563. If the information sought was relevant to legal proceedings, or would be of use in them, that added to the weight of the factors against disclosure, as it would effectively deny the relevant public authority its right to refuse disclosure (paragraphs 27 and 34 to 35);
2. (*AGO decision*) the public interest in maintaining the confidentiality of instructions for legal advice concerning complex, sensitive and constitutionally important issues outweighed the public interest in openness, understanding and evaluating the Government’s decision. The weight of the arguments for non-disclosure could weaken over time, but the possibility of further legal proceedings meant that the factors favouring non-disclosure were still actively engaged (paragraphs 51 to 54);
3. (*CO decision*) an NCND response in respect of the appellant’s request for Cabinet minutes could not be based on section 35(3) because the public interest in maintaining the NCND exclusion did not outweigh the public interest in disclosing whether the CO held any such minutes (paragraphs 104 and 130);
4. (*CO decision*) the decision was in accordance with the law, to the extent that the Information Commissioner had been right to conclude that (save as regards the section 42 document) the public interest in maintaining the exemption in section 27 outweighed the public interest in disclosing the information (paragraphs 103 and 131).

The UT directed the CO to provide further information regarding the NCND response so that a further hearing could determine how to proceed with this aspect of the appellant’s appeal.

The appellant appeared in person.

Laura Elizabeth John, instructed by the Information Commissioner, appeared for the first respondent.

James Eadie QC and Julian Blake, instructed by the Government Legal Department, appeared for the second and third respondents.

[2016] UKUT 534 (AAC)

DECISION

(1) *This decision addresses the appellant's appeals against:*

- a. *The first respondent's decision of 13 January 2015 (in respect of the appellant's request for information from the second respondent dated 30 July 2013 (the AGO Request), and*
- b. *the first respondent's decision of 13 January 2015 on one document that is the subject of the appellant's appeal which contains information within the ambit of the appellant's request for information from the third respondent dated 14 August 2013 (the CO Request) namely the document that the first respondent concluded fell within the scope of section 42 of FOIA (Legal professional privilege).*

(2) *The appeals are dismissed.*

REASONS

Introduction

1. These appeals were transferred to the Upper Tribunal on 12 June 2015. They are against two decisions made by the first respondent (the Commissioner) relating to requests made under the Freedom of Information Act 2000 (FOIA).

2. The first request was made on 30 July 2013 and was addressed to the second respondent (the AGO). It requested:

“details of the advice given to [HMG] in respect of its decision to take military action against the Serbian / FRY authorities in Kosovo in 1999 ... together with any documents that were material to the decision of [HMG] to commence aerial bombardment of Kosovo and Serbia”.

We shall refer to this as the AGO Request. As can be seen from its terms it is directed to advice about a specific decision or decisions. It has been common ground that it was a request for the advice given by the Attorney General of the time (Lord Morris).

3. The initial response to the AGO Request was a response neither confirming nor denying (NCND) whether information within the scope of the request was held. This response was based on section 35(3) of FOIA. The Commissioner decided that the fact that the Attorney General (the AG) had given such advice was in the public domain when the request was made and so in effect that as the “cat was out of the bag” the public interest did not favour neither confirming nor denying whether information within the scope of the AGO request was held. Unsurprisingly, this

decision was not appealed and on 26 March 2014 the AGO responded confirming that it held information within the scope of the request but withholding it in reliance upon the exemption set out in section 35(1)(c) (Law Officers' Advice). This was part of the disputed information in the closed bundle before us (the Disputed Information).

4. By a decision notice dated 13 January 2015 (the AGO Decision) the Commissioner upheld the AGO's reliance on section 35(1)(c).

5. On the appeal against the AGO Decision reliance is also placed on section 42(1) (LPP) and section 27(1) (international relations). These additional claims are unsurprising because LPP clearly applies to the legal advice of the Law Officers and section 27 is likely to be engaged by information included in instructions for and the content of the relevant advice.

6. The second request was made on 14 August 2013 and was addressed to the third respondent (the CO). It requested:

“copies of all records concerning the decision to commence a military air campaign against Serbia and Kosovo on 24 March 1999. Specifically we request copies of:

1. Minutes of Cabinet meetings, during which that decision was discussed.

2. Memorandum between relevant Government Departments and specifically the Foreign and Commonwealth Office and the Ministry of Defence.

3. Any other records relating to the decision”.

7. So this request (the CO Request) is directed to information about a defined decision. It is framed in wide terms and is for records (not information) and specifically requests minutes of Cabinet minutes. Before us it was accepted that this related to minutes of any meetings of the full Cabinet and of Cabinet committees.

8. The Commissioner's decision in respect of the CO Request is dated 13 January 2015 (the CO decision) and by it the Commissioner held that the CO was entitled to rely on:

- i) the exemptions in sections 27(1)(a) to (d) and 42(1) in respect of the information it had confirmed it held and had provided on a closed basis, and
- ii) its NCND responses.

Procedure

9. At one stage the two appeals were to be held separately. A factor relating to this was the existence of proceedings in the Queen's Bench Division by claimants, who are clients of the appellant (who is a solicitor) against the Ministry of Defence (the QB proceedings). Those claimants are the widows of Serbs abducted or murdered in or near Pristina, between 16 June and 5 July 1999. The teenage son of one of the claimants was murdered alongside his father and, in very short summary, the claimants allege that British forces “failed to protect their family members or properly investigate [the killings] and to date the perpetrators remain at large”. On 4 August 2016, Irwin J handed down a judgment on a number of preliminary issues in the QB proceedings ([2016] EWHC 2034 (QB)). Irwin J decided the preliminary issues against the claimants and the issue whether they will be given permission to appeal remains alive.

10. The relevant date for our purposes is the time when the requests were responded to by respectively the AGO and the CO and so, after internal reviews, respectively May 2014 and January 2014 (see *APPGER v IC and FCO* [2015] UKUT 377 (AAC); [2016] AACR 5 at paragraphs 43 to 59).

11. We gave directions that the Disputed Information was to be closed material and any argument or evidence that disclosed its content was to be advanced and held on closed basis. Further, we directed that if the AGO or the CO wanted to rely on any further closed material or evidence they were to make an application for that purpose. In the events that happened they did not seek to rely on any further closed material or evidence.

12. Evidence was given on behalf of the AGO by a statement made by the Director General of the AGO (the AGO witness) and on behalf of the CO by two statements of a senior civil servant who had been Director General, Civil Service Group in the CO (the CO deponent).

13. We did not hear any oral evidence from the persons who had made statements filed by the appellant.

14. The appellant had provided a list of questions that she would want to be put to the respondents' witnesses in any closed session. The vast majority of them could be and were put in open session. After each of the witnesses had finished their open evidence we clarified with the appellant what she wanted us to ask in closed session and then heard closed evidence from each witness. Having done so we reported back to the appellant.

15. In particular the appellant wanted us to look at the timing of the advice given by the AG and the content of what was considered by him and by those who saw the Disputed Information provided by the CO. This links to her public interest arguments. We reported back that we had done this and had considered whether aspects of the timing or content favoured disclosure.

16. The Commissioner, through counsel, put questions in closed session on the premise that if the appellant had been there, and so was aware of the contents of the closed material, she would have asked such questions. We told the appellant that this has been done.

17. We also asked whether documents referred to in the information that the AGO had confirmed it held but were not before us were likely to be held by the AGO and so had been overlooked. We were satisfied that this was unlikely.

18. We record that in our view:

- i) It was appropriate for the public interest arguments to be addressed only in open evidence and so we do not share the surprise expressed in the Commissioner's skeleton concerning this approach.
- ii) It meant that the closed exercise was limited to checking that the open arguments linked with the contents of the Disputed Information.
- iii) As it was convenient to do so through the witnesses in closed session this is what we did.
- iv) This exercise could also have been done by submission and there was no closed evidence that added to or detracted from the open evidence and arguments on the relevant public interest balances. This was because once it was established that the

claimed exemptions applied and that the public interest arguments could be founded on the contents of the Disputed Information, which was obvious on any reading of it, the public interest arguments were not affected by particular aspects of the contents.

19. Having given this account of the proceedings in respect of the appeals against both the CO Decision and the AGO Decision, this decision is confined to the appellant's appeals against:

- i) the AGO Decision, and
- ii) the CO Decision that one document held by the CO engaged the exemption in section 42 (LPP) and that, applying that exemption, the information it contains should not be disclosed.

20. We have written a separate decision on the remainder of the appeal against the CO Decision.

The application of sections 35(1)(c) and 42 to the AGO Request and of section 42 to one document within the scope of the CO Request

21. The Commissioner concluded that section 42 and not section 27 applied to the information in one document within the scope of the CO Request (the CO section 42 Document). The reasons for that conclusion of the Commissioner are set out in a confidential annex to the CO Decision.

22. In our view, there was no need for us to consider the reasoning in the confidential annex for that conclusion because we have dealt with the appeals on the basis that only section 42 applies to the CO section 42 Document (see paragraphs 19 and 56 hereof and our decision in the appeal against the CO Decision). We were not invited to consider that reasoning at the hearing. Indeed that annex was not included in our papers for the hearing.

23. The Disputed Information includes the CO section 42 Document and all of the documents provided on a closed basis by the AGO in response to the AGO Request (the AGO Disputed Information).

24. The application of sections 35(1)(c) and 42 to the AGO Disputed Information is self-evident and requires no further explanation to anyone who has read that material. Indeed, this consequence flows from the terms of the AGO Request.

25. It is also self-evident to a reader of the CO section 42 Document that section 42 is engaged and that it relates to the provision of advice from the AG. Indeed this document is also included in the AGO Disputed Information.

26. A further open explanation is not necessary or practical without disclosing the content of these documents. In any event, the engagement of the exemptions as found by the Commissioner was not disputed on this appeal.

LPP and the section 2(2)(b) public interest balance

27. There is an obvious link between the public interests that found section 35(1)(c) (Law Officers' advice) and section 42 (LPP). There are some additional factors that apply to Law Officers' advice that we address separately.

28. In the context of what has to be disclosed in legal proceedings, and so when the public interest in favour of disclosure is the strong one that cases should be decided fairly and correctly

having regard to all relevant evidence, the courts have concluded that the litigant has a right not to disclose relevant information/evidence covered by LPP (advice or litigation privilege). There are only a few exceptions to that right and its existence means that competing public interests do not have to be weighed, or that, save when such exceptions apply, the courts have decided that the public interests in favour of enabling the litigant to preserve the confidentiality of information/evidence covered by LPP will always outweigh those in favour of the disclosure and so admissibility of that relevant evidence in the proceedings.

29. From a similar starting point, namely the private and public benefits of preserving the confidentiality of (a) other communications of a litigant with, for example, a banker, accountant, doctor or priest, or (b) ministerial and other communications that could found a public interest immunity (PII) claim, the courts have taken a different view in that they have decided that the litigant does not have such a right. Accordingly, if relevant, such confidential communications must be disclosed in the proceedings unless it can be established that disclosure would be contrary to the public interest. In that balance the courts have decided that the public interest in preserving confidentiality is not of itself sufficient to found non-disclosure of relevant evidence.

30. FOIA has not followed the approach taken by the courts to LPP or confidential information in that it has introduced a public interest test for both.

31. This does not mean that the public interests in not disclosing LPP information identified in and by the courts are not relevant in the exercise of weighing the competing public interests required under FOIA. The relevance and weight of those factors have been recognised in a number of cases relating to FOIA (see for example *BERR v O'Brien* [2009] EWHC 164 (QB) in particular at [53]). Those cases provide authority for the conclusion, with which we agree, that those factors, and the approach of the courts to them, identify powerful public interest reasons in favour of the non-disclosure of LPP information. However, it must be remembered that the conclusion reached by the courts on the balance of the competing public interests in respect of LPP does not apply to the FOIA balancing exercise.

32. Many may think that the public interest in the disclosure of relevant evidence to do justice is stronger than the general public interest in favour of disclosure under FOIA, but as Parliament did not make LPP an absolute exemption it recognised and intended that in some cases the public interest would favour disclosure under FOIA of LPP information.

33. The existence of proceedings and the need for the LPP information to be relevant to those proceedings are central factors in the courts' approach and conclusion that the litigant has a right to refuse to disclose LPP information in those proceedings. However, in some and perhaps many cases there will be no realistic connection or overlap between a FOIA request and existing litigation or litigation that can be reasonably contemplated and it seems to us that this is likely to be one of the reasons why Parliament decided that under FOIA LPP was not to be an absolute exemption.

34. We take the view, in line with earlier authority, that:

- i) the factors identified by the courts in favour of the non-disclosure of LPP information provide powerful reasons for a refusal of a FOIA request, but
- ii) it must be remembered in the FOIA context they do not found a right, and so

- iii) in the FOIA context a fact sensitive weighing of the competing public interests must be carried out (see for example *BERR v O'Brien* at [41] and [58] relating to the approach to the public interest test and [64] of the judgment in *HM Treasury v ICO* cited below).

35. In that weighing exercise we take the view that if the information sought under FOIA is relevant to, or might be or might have been of use in, existing, concluded or contemplated legal proceedings this adds to the weight of the factors against disclosure because, although FOIA is applicant and motive blind, the disclosure would effectively deny the public authority to whom the FOIA request is directed its right as a litigant in proceedings to refuse disclosure and so cause damage to the manner in which proceedings are, have been or might be conducted, and thus to the administration of justice.

Law Officers' advice and the section 2(2)(b) public interest balance

36. As noted in *HM Treasury v the Information Commissioner* [2009] EWHC 1811 (Admin); [2010] 1 QB 563 section 35(1)(c) and section 35(3) reflect the Law Officers' Convention. We are not concerned with section 35(3) and so the NCND aspect of the Convention but with the parts of it that relate to the disclosure of the contents of the information relating to the advice (eg the instructions for it and the advice itself). This aspect of the Law Officers' Convention clearly overlaps with the LPP exemption with the result that the general factors in favour of maintaining the confidentiality of information seeking and giving legal advice apply to it as they apply more generally.

37. But the role of the Law Officers (the providers of the advice) and the importance of the Government acting in accordance with the Rule of Law are additional factors to be taken into account. As to those additional factors:

- i) The advice of the Law Officers is regularly sought in respect of matters of particular complexity, sensitivity and constitutional importance. This enhances the need for full and candid instructions being given to them about such matters and for properly reasoned and balanced advice.
- ii) It is axiomatic that such advice is likely to be necessary and sought at, and in respect of, high levels of Government decision-making in respect of national and international issues that engage the high public interest in the Government acting in compliance with the Rule of Law (nationally and internationally).

38. The AGO witness told us and we accept that:

- i) permission to disclose the advice of a Law Officer would be sought from the Law Officers at the time it was sought rather than of the Law Officer who gave the advice. This accords with the approach described by Lord Morris in the passages in his autobiography included in the evidence and with the nature of the advice ie it is advice to Government,
- ii) if a Law Officer was of the view that his or her advice should be sought or has been sought and has not been followed appropriately, and that situation was not remedied, the political repercussions of his or her resignation would be enormous and so the views of the Law Officers for the time being on such matters have considerable force, and

- iii) the circumstances in which the advice of the AG in respect of the taking of military action in Iraq was disclosed were very materially different to the circumstances in this case, and one of those differences is the point that, in the case of Iraq, there had been a partial, inaccurate leak to the media and it was considered that this was a significant factor in favour of disclosing the full advice and so an accurate account of its content.

39. More generally we would like to thank the AGO witness for her balanced and well-reasoned evidence based on considerable relevant experience.

The public interest in favour of disclosure

40. The public interest in favour of disclosure is founded on the public interest in openness and in understanding and evaluating on an informed basis the reasons for decisions made by public authorities.

41. In this case, as accepted by the AGO (and the CO), the nature of the decision to start a military campaign and its consequences mean that there is a strong public interest in knowing as much as possible about why the decision was taken and so the matters of fact and law that were taken into account, the reasoning of the legal advice that was given and whether that advice was followed and was factually justified. We too accept this.

42. We also accept the appellant's points that advice about the decision to commence military action affected the public at large, resulted in considerable cost to the public purse and loss of life and that, at the time, it was proclaimed to the world by the UK Government that the military action taken was legal.

43. Additionally the appellant placed reliance on the following:

- i) Paragraph 64 of the judgment of Blake J in *HM Treasury v ICO* where he said:

“Nothing in this judgment is intended to undermine the important new principles of transparency and accountability that the FOIA has brought to government in many ways. The Law Officers’ Convention will now operate subject to the principles of the FOIA, which means that neither the government department that may have sought or received the advice or the Law Officers that gave it will any longer make final binding decisions on what, whether and when information may be disclosed. I can certainly contemplate, for example, that the context for the commencement of hostilities in Iraq was of such public importance that irrespective of the decision of government to make partial disclosure, strength of public interest in disclosure of the advice as to the legality of the Iraq war might well have outweighed the exemption in its general and particular aspects.”

- ii) Although it was accepted that (a) the Law Officers’ Convention was important and should be given weight, and (b) the information now sought about the legal advice given could not properly have been sought at the time, 17 years have now passed (and we add about 14 years had passed at the relevant dates in 2014 for our purposes – see paragraph 10 above) which greatly weakens the public interest against disclosure, and founds the view that it would do no harm.
- iii) The extent of the disclosure of the advice given by Lord Morris in his autobiography.

- iv) The statements put in the public domain that she maintains do not withstand scrutiny. For example, the statement to the UN Security Council on 24 March 1999 that:

“The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe ...

Every means short of force has been tried to avert this situation. In the circumstances, and as an exceptional measure on the grounds of overwhelming humanitarian necessity, military intervention is legally justifiable.”
- v) A number of statements from responsible and informed bodies and persons (a) supporting the assertion of the appellant that the military action in Kosovo was not justified in fact or law, and (b) to the effect that it caused a humanitarian catastrophe and was not a justifiable and lawful reaction to one.
- vi) The disclosure of the advice of the AG relating to the taking of military action in Iraq in which it was stated that the AG of the time had taken account of military action taken on earlier occasions, including in Kosovo in 1999.
- vii) There was no rational basis for disclosing the advice in respect of Iraq and not that in respect of Kosovo.
- viii) The Iraq Inquiry and Report show that there is a weighty public interest in disclosure of all the factors and reasoning behind a decision to take military action and the extent of the disclosure about and relating to the invasion of Iraq supports the disclosure sought in this case. (The Report post-dates the relevant dates for our purposes but we accept that as at those dates in 2014 (see paragraph 10 above) these points can be made by reference to the situation that then existed).

44. We acknowledge that the combination of those factors identifies an arguable case that disclosure of the information sought by the AGO Request and the section 42 CO Document would be in the public interest.

45. However, on the points listed in paragraph 43 we comment:

- i) In our view Blake J is going no further than saying that there may be cases in which the public interest may favour disclosure and so the approach we set out in paragraph 34 above.
- ii) The points accepted by the appellant recorded in point (ii) about contemporaneous disclosure also recognise the fact sensitive approach that must be taken, as does the point on the passage of time.
- iii) We accept the evidence and submission of the AGO that Lord Morris’ account is not an official account and that it is self-serving. It contains indications that he would have liked to say more, but its tenor is that he thought that his advice was appropriately sought and followed which is confirmed by the fact that he remained in office. In our view, his account has some internal inconsistencies, but what he says does not conflict in any way with the public announcements made at the time of the reasons for the military action.

- iv) It is clear that the Government's firm position is that it does not accept that as a matter of fact and/or law the decision to take the military action was not justified. It is clear that at the relevant times in 2014 (and now) this dispute of fact and law may be relevant in the QB Proceedings and could be relevant in other proceedings in this country or an international court.
- v) It is a common feature of private and public affairs that an assertion of the legality of a course of action is made on the basis of legal advice. This does not waive LPP. Indeed, LPP protects the disclosure of the instructions seeking and the contents of that advice.
- vi) We have already set out that we accept the circumstances relating to the disclosure of the AG's advice concerning the Iraq campaign are materially different. And, in any event, we do not accept that disclosure in one arguably similar case necessarily points to disclosure in another. Indeed, there is force in the point that it is only in exceptional circumstances that a disclosure of such advice is in the public interest and so an argument based on similarities has little weight absent a pattern of disclosure.
- vii) Absent such a pattern the exceptionality of any case is free standing. Here that exceptionality is founded on the nature of the decision about which the legal advice was sought and given and its impact, and so the public interest in knowing the matters referred to in paragraph 41 above.

The public interest against disclosure

- 46. The points we make relate to the AGO Request and the section 42 CO Document.
- 47. The acknowledged factors relating to LPP and the disclosure of Law Officers' advice referred to above are all in play and all have weight.
- 48. The exceptionality argument in favour of disclosure flows from the nature and effect of the decision about which advice was sought and given and so it is founded on the same points as those which found the additional points relating to advice from the Law Officers (and so all the legal advice in question in this case) set out in paragraphs 36 to 38 above.

The balance of the public interest

- 49. In our view this comes down decisively in favour of non-disclosure.
- 50. We have read the relevant information and nothing in it adds to or detracts from the competing arguments for and against disclosure.
- 51. So the core argument is between exceptionality factors for and against disclosure. In our view, notwithstanding the passage of time these come down firmly in favour of non-disclosure because the weighty public interest arguments in favour of maintaining confidentiality of instructions for and legal advice relating to an issue of particular complexity, sensitivity and constitutional importance outweigh the counter arguments based on the same premise and so the public interest in openness and in understanding and evaluating on an informed basis the reasons for decisions of this character made by the Government.
- 52. We acknowledge that the passage of time can weaken the weight of the arguments for non-disclosure. But in this case the existence of the QB Proceedings, and the prospect of other

proceedings in this country or in an international court on disputed issues of fact and law relating to the published reason for taking the military action in Kosovo, mean that the weighty factors favouring non-disclosure are still actively engaged.

53. So, in our view the strongly held views of the appellant (and no doubt others), and their current wish to challenge the announced reasons for the military action in Kosovo and its legality, weaken their public interest arguments in favour of disclosure because it means that it cannot be said that the counter arguments are historical.

54. We have not investigated whether there would be an equivalent to LPP in any proceedings in an international court; but, if there is, the point made in paragraph 35 above would apply to them as well as to the QB Proceedings. But, if it only applies to the QB Proceedings, in our view it is a powerful factor against disclosure.

Section 27

55. The application of this exemption (international relations) was raised on the appeal. As mentioned above, we have not considered the Commissioner's reasoning that section 27 did not apply to the CO section 42 Document.

56. Given our conclusion on the application of sections 35(1)(c) and 42 to the AGO Disputed Information and the CO section 42 Document there is no need for us to consider the alternative argument for their non-disclosure based on section 27.

57. However, we record that, as one would expect given the subject matter of the advice sought and given, a reading of the AGO Disputed Information shows that the information in those documents that is within the ambit of the AGO Request contains information that also engages the exemption in section 27. We have dealt with the public interest balance relating to section 27 information in our decision relating to the CO Request.

[2016] UKUT 535 (AAC)

DECISION

(1) This decision addresses the appellant's appeal against the first respondent's decision of 13 January 2015 ("the CO Decision") regarding the appellant's request for information from the Cabinet Office ("the CO Request") in the form of Cabinet minutes, departmental memoranda and other records "concerning the decision to commence a military air campaign against Serbia and Kosovo on 24 March 1999".

(2) The CO Decision is not in accordance with the law, to the extent that section 35(3) of FOIA (which excludes the duty to confirm or deny the existence of certain information held by a government department) did not entitle the CO to neither confirm nor deny whether it held Cabinet minutes within the scope of the appellant's request. The appellant's appeal is, accordingly, allowed, to that extent.

(3) Within 21 days of the promulgation of this Decision the Cabinet Office is to respond to the CO Request:

(a) setting out whether or not it is asserted that the NCND response based on sections 23(5) and/or 24(2) of FOIA made by the letter dated 14 October 2013 covers all the

information within the scope of that request other than the information the Cabinet Office confirmed it held (see paragraphs 11(i), 25(ii), 49 and 91 of this Decision),

(b) in any event setting out whether it is making an NCND response to the information sought by the CO Request on that basis, and to the extent that is not making such an NCND response

(c) confirming or denying whether it holds further information within the scope of the CO Request (eg information in Cabinet minutes) and, if it holds such information, its position on the application of any applicable FOIA exemptions to it.

(4) The CO Decision is in accordance with the law, to the extent that the first respondent was right to conclude that (save as regards one document falling within the scope of section 42 of FOIA (Legal professional privilege)), the public interest in maintaining the exemption in section 27 of FOIA (International relations) outweighs the public interest in disclosing the information within the scope of the appellant's request. The appellant's appeal is, accordingly, dismissed, to that extent.

(5) A hearing is to be set on a date after compliance with paragraph (3) for the purpose of determining the approach to be taken on the appellant's appeal in respect of the first respondent's application to the CO Request of sections 23(5) and 24(2) of FOIA in the CO Decision having regard to the positions of the parties on whether that appeal needs further consideration and if it does the need for further submissions etc, as explained in paragraphs 96 to 109 below.

(6) The appeal against the first respondent's decision of 13 January 2015 regarding the appellant's request for information from the second respondent in the form of "advice given to HM Government in respect of its decision to take military action against the Serbian/FRY authorities in Kosovo in 1999 ... together with any documents that were material to the decision of [HM Government] to commence aerial bombardment of Kosovo and Serbia" ("the AGO Request") will be the subject of a separate decision of the Tribunal (as will the appeal in respect of the document referred to in paragraph (3) above). No further submissions from the parties are required in this regard.

REASONS

Introduction

1. These appeals were transferred to the Upper Tribunal on 12 June 2015. They are against two decisions made by the first respondent (the Commissioner) relating to requests made under the Freedom of Information Act 2000 (FOIA).

2. The first request was made on 30 July 2013 and was addressed to the second respondent (the Attorney General's Office (the AGO)). It requested:

"details of the advice given to [HMG] in respect of its decision to take military action against the Serbian / FRY authorities in Kosovo in 1999 ... together with any documents that were material to the decision of [HMG] to commence aerial bombardment of Kosovo and Serbia".

We shall refer to this as the AGO Request. As can be seen from its terms it is directed to advice about a specific decision or decisions. It has been common ground that it was a request for the advice given by the Attorney General of the time (Lord Morris).

3. The initial response to the AGO Request was a response neither confirming nor denying (NCND) whether information within the scope of the request was held. This response was based on section 35(3) of FOIA. The Commissioner decided that the fact that the Attorney General (the AG) had given such advice was in the public domain when the request was made and so in effect that as the “cat was out of the bag” the public interest did not favour neither confirming nor denying whether information within the scope of the AGO request was held. Unsurprisingly, this decision was not appealed and on 26 March 2014 the AGO responded confirming that it held information within the scope of the request but withholding it in reliance upon the exemption set out in section 35(1)(c) (Law Officers’ Advice). This was part of the disputed information in the closed bundle before us (the Disputed Information).

4. By a decision notice dated 13 January 2015 (the AGO Decision) the Commissioner upheld the AGO’s reliance on section 35(1)(c).

5. On the appeal against the AGO Decision reliance is also placed on section 42(1) (Legal professional privilege (LPP)) and section 27(1) (international relations). These additional claims are unsurprising because LPP clearly applies to the legal advice of the Law Officers and section 27 is likely to be engaged by information included in instructions for and the content of the relevant advice.

6. The second request was made on 14 August 2013 and was addressed to the third respondent (the CO). It requested:

“copies of all records concerning the decision to commence a military air campaign against Serbia and Kosovo on 24 March 1999. Specifically we request copies of:

4.Minutes of Cabinet meetings, during which that decision was discussed.

5.Memorandum between relevant Government Departments and specifically the Foreign and Commonwealth Office and the Ministry of Defence.

6.Any other records relating to the decision”.

7. So this request (the CO Request) is directed to information about a defined decision. It is framed in wide terms and is for records (not information) and specifically requests minutes of Cabinet minutes. Before us it was accepted that this related to minutes of any meetings of the full Cabinet and of Cabinet committees.

8. By a letter from its FOI team dated 14 October 2013, and an annex to it, the CO confirmed that it held information within the scope of the CO request but that it was withholding all of that information under sections 35(1)(a) and (b) (development of policy and Ministerial communications), 26(1)(a) and (b) (defence) and 27(1)(a), (c) and (d) (international relations). This was part of the Disputed Information in the closed bundle before us.

9. Additionally by that letter, in respect of the specific request for Cabinet minutes the CO in reliance on section 35(3) FOIA by reference to section 35(1)(b) FOIA (Ministerial communications) neither confirmed nor denied that it held any Cabinet minutes (an NCND

response). It also gave an NCND response in reliance on sections 23(5) (security bodies) and section 24(2) (national security).

10. The Commissioner's decision in respect of the CO Request is dated 13 January 2015 (the CO decision) and by it the Commissioner held that the CO was entitled to rely on:

- i) the exemptions in sections 27(1)(a) to (d) and 42(1) in respect of the information it had confirmed it held and had provided on a closed basis, and
- ii) its NCND responses.

The Commissioner did not consider sections 26(1)(a) and (b) (defence), 27(2) (confidential information from another State), or 35(1)(a) and (c) (government policy and Law Officers' advice).

11. Accordingly the Commissioner concluded that:

- i) the CO was entitled to rely on NCND in reliance on section 35(3), in respect of Cabinet minutes, and section 23(5) and section 24, without reference to any class of material that contains information, and
- ii) in respect of material and so the information in it that the CO did not NCND, and so confirmed that it held, the CO could rely on the exemptions it advanced.

As the Commissioner did not require the CO to take any further steps the result was that the CO did not have to provide any information in respect of the CO Request.

12. The CO Request went further than the part of it we have cited above. The appellant was informed by the CO that it had not found any information relating to that part of the request and this response has not been the subject of any argument before us.

13. The reliance on the exemptions in sections 26(1)(a) and (b) (defence), 27(2) (confidential information from another State), or 35(1)(a) and (c) (government policy and Law Officers' advice) in respect of the CO Request were alternatives that were not pursued with any vigour before us and we do not address them save to the extent that we address section 35(1)(c) (Law Officers' advice) in the context of the AGO Request and our conclusions on the public interest arguments relating to section 27(1), section 35(1)(c) and section 42 clearly have a close overlap with those that would arise on those alternative exemptions.

Procedure

14. At one stage the two appeals were to be held separately. A factor relating to this was the existence of proceedings in the Queen's Bench Division by claimants, who are clients of the appellant (who is a solicitor) against the Ministry of Defence (the QB proceedings). Those claimants are the widows of Serbs abducted or murdered in or near Pristina, between 16 June and 5 July 1999. The teenage son of one of the claimants was murdered alongside his father and, in very short summary, the claimants allege that British forces "failed to protect their family members or properly investigate [the killings] and to date the perpetrators remain at large". On 4 August 2016, Irwin J handed down a judgment on a number of preliminary issues in the QB proceedings ([2016] EWHC 2034 (QB)). Irwin J decided the preliminary issues against the claimants and the issue whether they will be given permission to appeal remains alive.

15. The relevant date for our purposes is the time when the requests were responded to by respectively the AGO and the CO and so, after internal reviews, respectively May 2014 and January 2014 (see *APPGER v IC and FCO* [2015] UKUT 377 (AAC); [2016] AACR 5 at paragraphs 43 to 59).

16. We gave directions that the Disputed Information was to be closed material and any argument or evidence that disclosed its content was to be advanced and held on closed basis. Further, we directed that if the AGO or the CO wanted to rely on any further closed material or evidence they were to make an application for that purpose. In the events that happened they did not seek to rely on any further closed material or evidence.

17. Evidence was given on behalf of the AGO by a statement made by the Director General of the AGO (the AGO witness) and on behalf of the CO by two statements of a senior civil servant who had been Director General, Civil Service Group in the CO (the CO deponent). There was some overlap between the issues covered but it was the CO deponent who addressed NCND. We were told that other duties of the CO deponent meant that he was unable to attend the hearing of the appeal and by consent another senior civil servant, the Director, Foreign Policy at the National Security Secretariat, CO (the CO witness) attended to speak to his statements.

18. We did not hear any oral evidence from the persons who had made statements filed by the appellant.

19. The appellant had provided a list of questions that she would want to be put to the respondents' witnesses in any closed session. The vast majority of them could be and were put in open session. After each of the witnesses had finished their open evidence we clarified with the appellant what she wanted us to ask in closed session and then heard closed evidence from each witness. Having done so we reported back to the appellant.

20. In particular the appellant wanted us to look at the timing of the advice given by the AG and the content of what was considered by him and by those who saw the Disputed Information provided by the CO. This links to her public interest arguments. We reported back that we had done this and had considered whether aspects of the timing or content favoured disclosure.

21. The Commissioner, through counsel, put questions in closed session on the premise that if the appellant had been there, and so was aware of the contents of the closed material, she would have asked such questions. We told the appellant that this has been done.

22. We also asked whether documents referred to in the information that the AGO had confirmed it held but were not before us were likely to be held by the AGO and so had been overlooked. We were satisfied that this was unlikely.

23. We record that in our view:

- i) It was appropriate for the public interest arguments to be addressed only in open evidence and so we do not share the surprise expressed in the Commissioner's skeleton concerning this approach.
- ii) It meant that the closed exercise was limited to checking that the open arguments linked with the contents of the Disputed Information.
- iii) As it was convenient to do so through the witnesses in closed session this is what we did.

- iv) This exercise could also have been done by submission and there was no closed evidence that added to or detracted from the open evidence and arguments on the relevant public interest balances. This was because once it was established that the claimed exemptions applied and that the public interest arguments could be founded on the contents of the Disputed Information, which was obvious on any reading of it, the public interest arguments were not affected by particular aspects of the contents.
24. Having given this account of the proceedings in respect of the appeals against both the CO Decision and the AGO Decision, what follows is confined to the appellant's appeal against the CO Decision.

THE CO APPEAL

NCND general comments

25. The NCND claims upheld by the Commissioner had the result that:
- i) no Cabinet minutes have been identified and provided to the Commissioner or the Tribunal on a closed basis, and
 - ii) on an open basis the Commissioner and the Tribunal do not know the extent of any information held by the CO in respect of which the NCND response based on section 23(5) and section 24(2) has been made.

The approach taken in this case

26. Before us and the Commissioner the two NCND responses have been considered separately and on the basis that the only relevant NCND argument in respect of the Cabinet minutes is based on section 35(3). So, if we were to conclude that the public interest balance was against its application, we should direct the CO to say whether or not it holds Cabinet minutes, on the basis that it cannot rely on section 35(3) to give an NCND response.

27. We see and accept the logic of this approach because the NCND responses relate to different types of information and the obvious engagement of section 35(3) with the request for Cabinet minutes (and so, as put, for records) rather than the information that can be obtained by reading them.

28. But it seems to us that the terms of the CO Request for Cabinet records, and so expressly of a level of decision-making, for the announced decision to commence a military air campaign has given rise to some of the problems that have arisen in the way in which the NCND response has been advanced in respect of the Cabinet minutes.

29. It seems to us that in many cases when reliance is placed on section 35(1)(a) or (b) in respect of a request for information about either (a) a decision that has been announced by a Secretary of State or his Department, or (b) a decision with which a Department has an obvious connection and responsibility, that the connection between the decision and the public authority is such that an initial response of NCND would be unreal and so an NCND argument based on section 35(3) would be rare.

30. Also, when a Government decision has been made and announced and a FOIA request follows the terms of the statute and so does not isolate or refer to a level of Government decision-making, or to particular records or documents, it is not easy to see how NCND could be

applied in a blanket way to a request for information about that decision unless it could be based on an argument that disclosure of the involvement of the public authority to whom the request is directed would cause damage to the public interest.

31. This was not the line adopted by the CO to this request because it confirmed that it held some of the information requested and so acknowledged that it was involved to that extent.

32. The express terms of the request relating to Cabinet minutes and so to documents held by the CO reflect an approach that can be convenient for (a) identifying information held that is within a request, and (b) claiming a FOIA exemption by reference to a document or record that could contain a range of information.

Problems arising from a request or a response referring to and providing a document on a closed basis

33. These problems flow from the points that:

- i) the duties imposed by FOIA relate to information and not to documents or records,
- ii) a document or record may well contain all of the following:
 - a) information that engages argument on the application of a range of exemptions and so an absolute exemption- eg section 23(1) and one that engages the public interest balance (a qualified exemption – eg section 35(1)(b)),
 - b) information that is within the request and does not engage a FOIA exemption, and
 - c) information that is outside the request,
- iii) disclosure in a redacted form of a document or record (as opposed to disclosure of information extracted from it) could “give the game away” particularly in respect of section 23(1), and
- iv) disclosure that a document or record provided on a closed basis contains information in respect of which an NCND response has been given would also “give the game away”.

34. These problems lead to questions relating to the application of an NCND response in practice when a public authority confirms that it holds some information within a request and either provides it or claims an exemption in respect of it but, is by the NCND response, asserting that it may or may not hold other exempt information within the ambit of the request. The questions relate to the identification of the various types of information without “giving the game away”.

35. These problems and questions mean that, in line with the points raised in the second UT Decision in APPGER (at paragraphs 10 to 34 of the second UT Decision in APPGER) about redacting documents in respect of which more than one exemption is relied on, careful consideration must be given to the way in which an NCND response is made and justified when a public authority confirms that it holds information requested that it provides or asserts it does not have to provide, and gives an NCND response.

36. They also arise when, as here, two NCND responses are given, but where, as we find to be the case, the decision based on section 35(3) in respect of Cabinet minutes is not justified.

The arguments before us

37. The oral argument before us on NCND focused on the public interest balance relating to the NCND response based on section 35(3) to the request for Cabinet minutes. Naturally, it was common ground that if Cabinet minutes existed they would record information that is within section 35(1) and so be exempt if the requirement in section 2(2)(b) is met.

38. The written and oral challenge to the NCND response based on section 23(5) and section 24(2) was very limited.

39. The Commissioner argued that the CO Decision correctly applied the approach to NCND based on section 23(5) and section 24(2) taken by the F-tT in *APPGER v IC and FCO* (EA/2011/0049, 50 and 51) [2012] 1 Info LR 258 (the “F-tT Decision in APPGER”). An appeal against the F-tT Decision in APPGER was upheld in *APPGER v IC and FCO* [2013] UKUT 560 (AAC) and [2015] UKUT 377 (AAC); [2016] AACR 5 (the “UT Decisions in APPGER”). On that appeal, the UT did not consider the NCND conclusions and reasoning of the F-tT based on section 23(5) and section 24. It did however consider section 23(1) and in particular the construction of section 23(1) and so of the same words in section 23(5).

40. As appears from the second UT Decision in APPGER, the UT held and we agree that:

- i) a steer (such as that given by the F-tT in the F-tT APPGER Decision and other cases) that the phrase “relates to” in section 23(1) (and so section 23(5)) is used in a wide sense was permissible, but and it is an important but
- ii) a steer or guidance in general terms as to the meaning of the ordinary words used in the statute was impermissible and unhelpful (see paragraphs 23 to 25).

41. The F-tT Decision in APPGER covered (a) requests to which an NCND response based on section 23(5) and section 24(2) had been given, and (b) requests in which a response based on section 23(1) had been given. It is important to remember that. Its approach to NCND is found at paragraphs 73 to 114. It was not argued before us that any part of that approach was wrong. In this case the conclusion that section 23(5) and section 24(2) can be claimed together was not challenged. We do not dissent from that view but do not think that we should confirm it in the absence of argument and as appears later (see paragraphs 98 to 101) we consider that further argument on this point and others relating to the approach taken by the Commissioner to the NCND response based on section 23(5) and section 24(2) is needed.

42. In our view, the approach taken in the F-tT Decision in APPGER, and by the F-tT in the cases referred to in that decision, should not be applied in substitution for the application in the given case of the relevant sections which set out the approach to be taken in ordinary English words. This reflects the well-established approach referred to and taken in paragraph 23 and 24 of the second UT Decision in APPGER, which we have already referred to, and where the UT said:

“23. We agree with Ms Steyn that it is important not to allow a judge-made formulation based on statutory functions to supplant or override the statutory ‘relates to’ test in section 23(1). However, we also agree with Mr Hopkins that a steer as to the contours of the

statutory language may be helpful (not least for the Commissioner, for future F-tTs and for future requesters).

24. There are many cases in which Ms Steyn’s submission is reinforced by guidance to the effect that the approach taken to the meaning and application of an ordinary English word that can have a range of meaning is best shown by the reasons given in a particular case for the application of the test that contains it. But that solution is not, or is not as readily, available when a FOIA exemption is found to apply to information. This is because an open explanation cannot be given by reference to the actual content of the information.”

43. As we explain below, on an NCND assessment of the public interest the qualification in the penultimate sentence of paragraph 24 does not apply because a contents assessment is not appropriate. This is because the assessment is based on the public interests for and against it being disclosed whether or not a public authority holds information of a particular description and not on the public interests for and against the disclosure of such information.

The approach based on statutory words

44. Section 2(1) of FOIA provides:

- “2. – (1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect the provision is that where either –
- a) the provision confers absolute exemption, or
 - b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,

section 1 (1)(a) does not apply ”

Section 1(1)(a) imposes the duty on a public authority to inform a person who makes a request under FOIA whether it holds information of the description specified in the request.

45. The statutory language means that:

- i) in the case of absolute exemptions, section 2(1)(a) will apply to and with the NCND provision in the relevant section (and so here between section 23(5)), and
- ii) in the case of qualified exemptions the public interest balance in section 2(1)(b) is what has to be applied.

46. In our view, the F-tT Decision in APPGER correctly recognises and proceeds on the bases that:

- i) the test set by section 2(1)(b). which relates to NCND, is significantly different to that set by section 2(2)(b), which arises only when the public authority has confirmed that it holds information and claims that the information requested should not be provided because an exemption that is not an absolute exemption applies, and

- ii) the consequence of an NCND response will often mean that the public authority will not provide the Commissioner or the tribunal with documents or records that may or may not contain information of the type that founds the NCND response. Indeed, if it was to do so, and the requester was to be so informed or given information that this was the case, it would destroy the purpose and effectiveness of an NCND response.

47. So in our view, the statute clearly provides that:

- i) an approach to the public interest arguments on NCND that fails to properly recognise that they are different to those relating to disclosure of the contents of the information of the statutory description in respect of which an NCND response has been given is incorrect, and
- ii) it is not appropriate for a public authority, the Commissioner or a Tribunal to assert or assess an NCND response on an open basis by reference to the contents of any information of the description in respect of which the NCND response has been given on a closed basis.

48. It therefore seems to us that the approach in paragraph 112 of the F-tT Decision in APPGER to the balancing exercise under section 24(2) needs to be treated with caution because:

- i) the relevant balancing act does not involve an assessment of harm on a contents basis, and so
- ii) as foreshadowed in paragraph 43 above, it is difficult to see a need to examine closed material in order to determine an NCND issue because the public interest balance is based on the hypothesis that the public authority may or may not hold the information, and that hypothesis means that the likelihood of the public authority holding information covered by the exemption is part of the explanation and examination of the section 2(1)(b) test, accordingly
- iii) in any cases in which the Commissioner or the Tribunal may call for or is provided with examples of information held by the public authority that engages the relevant exemption so that they can assess the validity of the public interest argument based on that hypothesis, this should be on a closed basis, and generally an open indication that they can do this should be avoided, and
- iv) the same is true of cases (perhaps contemplated in paragraph 112 of the F-tT Decision), where it may be necessary to examine closed material in order to determine whether the claimed NCND exemption is engaged (as opposed to where the balance falls to be struck).

49. The nature of an NCND response also means that the Commissioner and the Tribunal may well not know or need to ascertain the extent of the information covered by an NCND response based on section 23(5) and/or section 24(2). But, if they are provided with such information this should be on a closed basis, and generally an open indication that they have it should be avoided.

The public interest balance concerning the NCND response in respect of Cabinet minutes based on section 35(3)

50. Section 35(3) triggers the distinct test and so the public interest balance defined by section 2(1)(b). The CO's argument that this public interest balance fell in favour of NCND for the Cabinet minutes in its letter dated 14 October 2013 was put as follows:

“The CO recognises there is a general public interest in openness in public affairs in order to ensure that the public are able to scrutinise the manner in which public authorities reach important decisions. This makes for greater accountability, increases public confidence in government decision-making and helps to encourage greater public engagement with political life. These public interests have to be weighed against a stronger public interest that policy-making and its implementation are of the highest quality and fully informed by consideration of all the options. By confirming or denying whether there had been or had not been any Cabinet discussion on the military air campaign against Serbia and Kosovo in 1999 would weaken Ministers' ability to determine the agenda for Cabinet meetings free from public pressure dictating what should, or should not, be discussed at Cabinet. It would mean that Ministers will be constantly 'looking over their shoulders' for what the public reaction would be, and this could result in important topics not being raised at meetings because they are dropped in favour of less important issues that public opinion deems to be of greater importance, and this would have a damaging impact on the effectiveness of the Government to tackle the most important issues of the day. Ministers must be able to set the agenda for Cabinet free from outside interference. I have determined that in all circumstances of the case, the public interest in maintaining the exclusion outweighs the public interest in confirming or denying that information is held beyond that covered by the above exemptions.”

51. In the CO Decision, the Commissioner accepted the existence of the public interest arguments in favour of NCND. That decision contains the following:

“48. The public authority submissions on the balance of the public interest are summarised below.

49. It recognizes the general public interest in openness and transparency in government. Specifically, the public authority acknowledged that decisions Ministers make may have a significant impact on the lives of citizens both here and overseas (in this instance in Serbia and Kosovo) and there is a public interest in their deliberations being transparent. It also acknowledged that openness in government may increase public trust in and engagement with the government and has a beneficial effect on the overall quality of government. Specifically, there is a public interest in the public being well-informed about the government's handling of the decision to launch military action against Serbia and Kosovo in March 1999.

50 Against these interests, the public authority submitted that disclosure of information about how government took decisions on the launching of military action abroad would invite judgements about whether these decisions were taken at an appropriate level. Ultimately, this would be corrosive of Parliamentary democracy since it would hold Ministers and their advisers accountable for the level at which discussions occurred rather than for the decisions taken.

51 The public authority pointed out that there is a strong public interest in preserving the confidentiality of Cabinet discussions in order to protect the convention of collective Cabinet responsibility which underpins the accountability of governments to Parliament and is the foundation of Parliamentary sovereignty. It is noted that Part two, Section 2.1 of the Ministerial code sets out a Ministers duty to uphold the principle of collective responsibility while maintaining a united front when decisions are reached. The public authority therefore argued that confirming or denying whether it holds information relating to Ministerial communications in relation to the decision to launch military air strikes against Serbia and Kosovo in March 1999 would undermine collective Cabinet responsibility.

52 The public authority further submitted that it had found no evidence of urgent or widespread public concern with the circumstances of the launching of a military campaign against Serbia and Kosovo to justify overriding the Convention of collective Cabinet responsibility in this case.

Balance of the public interest

53 The Commissioner recognises for the same reasons as the public authority that there is a public interest in neither confirming nor denying whether the authority holds information relating to Ministerial communications in relation to the decision to launch military air strikes against Serbia and Kosovo in March 1999. He considers that the public interest in not confirming or denying the actual position is slightly weakened by the fact that the airstrikes took place over 15 years ago.

54 However, the Commissioner accepts that there is a strong public interest in preserving the Convention of Cabinet collective responsibility in this case. At the time the decision was taken by NATO in March 1999 to carry out the military strikes, there was widespread public concern regarding the humanitarian situation in Kosovo. The intervention by way of military air strikes was not met with widespread public disapproval in the UK. The Commission accepts that the strong public interest in preserving collective Cabinet responsibility has not weakened over time in this case.

55 He therefore finds that in all the circumstances of the case, the public interest in neither confirming nor denying whether the public authority holds information relating to Ministerial communications in relation to the decision to launch military air strikes in Serbia and Kosovo in March 1999 outweighs the public interest in doing so.”

52. This reasoning introduces and relies heavily on the Convention of Cabinet collective responsibility, which is not mentioned in the letter dated 14 October 2013. However, the reasoning in that letter is reflected in the first sentence of paragraph 50 of the CO Decision.

53. The evidence on the NCND response in respect of the Cabinet minutes was contained in the second of the statements filed by the CO which adopted the earlier assertions and conclusions of the Commissioner. It contained the following:

“12. It is vital that Ministers can be confident that their discussions will be protected so as to ensure that the most sensitive topics can be discussed freely. Any departure from this would be contrary to good government, which requires Ministers and their officials to engage in full, frank, and uninhibited consideration of policy options.

13. Disclosure of whether a particular topic was or was not discussed by the Cabinet erodes this protection. If the subjects which are discussed at Cabinet meetings were disclosed regularly it would be possible to identify both the range of subjects and issues that it discussed and the types of discussion that occurred. It is inevitable that the question of ‘why’ a subject was raised before the Cabinet will arise (‘is the Minister not confident in his or her own judgement?’) and conversely, ‘why not’ (‘won’t his or her colleagues support him?’).

14. Furthermore, Government Ministers are rightly answerable for the decision they take, not for the options they consider or the other influences on the policy formulation process. Disclosure of the details of Cabinet meetings (or of a failure to mention something at a Cabinet meeting) would invite judgements about whether decisions were taken at an appropriate level. Ultimately this would be corrosive of Parliamentary democracy (*a point expressly accepted and asserted by the Commissioner in the CO Decision*) as it would hold Ministers and their advisers accountable for the level at which discussions occurred rather than the quality of the decision actually taken.

15. The expectation of the participants is that their detailed consideration of policy options, including the level at which discussions took place, will remain private unless there is a very strong countervailing public interest in disclosure. A failure to maintain this principle would place pressure on those involved in the decision-making for decisions to be taken at a higher level than required, placing an unnecessary burden on the most senior levels of decision-making. It is inevitable that the public would regard those decisions taken at the highest level as carrying a greater legitimacy than those taken at Cabinet Committee or Ministerial level, even if these were in fact the most appropriate levels for the disclosure (sic) to be taken.

16. The greatest protection against the undermining of this principle is therefore to neither confirm nor deny whether the Cabinet Office holds minutes of Cabinet meetings on a given subject. The more information that is disclosed - e.g. the number of minutes / occasions a topic was discussed right up to the minutes themselves - the more damaging to this important principle.”

54. The parties agreed a timetable for the hearing which allotted 15 minutes to housekeeping and any opening followed by evidence from the AGO witness. It seems to us that, as had been indicated in an earlier email from the Chamber President, opening statements during which the issues were further defined and the parties would be able to assess the extent of the Tribunal’s reading and their understanding of the points being made would have been helpful. However, as the parties and the witnesses were operating to this timetable we went along with it but alerted them to the point that we were having considerable difficulty in following the force of the reasoning advanced by the CO, and accepted by the Commissioner, on the public interest that favoured NCND in respect of the Cabinet minutes and that we would be putting questions to the witnesses in respect of the process of Government decision-making generally and the reasoning set out in the CO evidence.

55. Albeit that the relevant reasoning was contained in the CO evidence we took advantage of the considerable experience of the AG witness in respect of the law and processes relating to Government decision-making to ask her questions about this. At this stage we expected that the CO witness would speak to the reasoning set out above in the CO evidence and, as a result, we did not carry out a full examination of this reasoning with the AG witness. However, as

recognised by Mr Eadie, it was apparent from our questions that we did not find this reasoning at all persuasive.

56. When the CO witness was called to give evidence, we were told that he thought that he could not profitably add to the evidence relating to the collective responsibility of Cabinet and the public interest arguments advanced by the CO in favour of NCND. This meant that he was no longer being proffered as a witness to be questioned about the paragraphs in the CO evidence that we have cited above. We agreed that he need not be questioned on those matters on the condition that if it were to be submitted that we should attach some particular weight to that written evidence based on the experience and responsibilities of the CO deponent, or for that or any other reason we thought it was necessary for the evidence of the CO deponent to be tested, this would be done.

57. In his submissions, in our view correctly, Mr Eadie made it clear that he accepted that the assessment of the reasoning, assertions and views advanced by the CO deponent in support of the public interest in favour of NCND in respect of Cabinet minutes was a matter for argument and did not give rise to a point that we should attach weight to the views of the CO deponent based on his responsibilities and experience or for any other reason.

58. He also, in our view correctly, abandoned the majority of that reasoning and therefore the majority of the reasoning of the Commissioner in supporting the NCND response in respect of Cabinet minutes. He however submitted that the genesis of the argument he advanced could be found in the statement of the CO deponent cited above. We agree and the same can be said of the letter dated 13 October 2013 and the CO Decision.

59. The Commissioner took the same stance and so abandoned the reasoning on this issue in the CO Decision and adopted Mr Eadie's oral argument.

Mr Eadie's oral argument

60. The argument was that as, for example, in the context of national security, NCND is a protective concept because, as and when it applies, it stops inferences being drawn on the existence of types of information and enables an equivalent position to be taken on other occasions. We agree.

61. Mr Eadie accepted and submitted that issues relating to the public interest in preserving the confidentiality of communications between members of the Cabinet or Ministers more generally and Collective Responsibility for Cabinet decisions and other Government decisions do not have any direct impact on the public interest balancing exercise that is relevant to an NCND response. This is because:

- i) those confidentiality/candour/responsibility arguments are directed to the substance and content of the discussions leading up to that decision and the decision itself, whereas in contrast
- ii) the public interests in favour of an NCND response must be directed to the process adopted by Government in making a decision and so the level within Government at which the decision was made and do not extend to the reasons for and so the discussions relating to that choice let alone to the reasons for and the discussions relating the substantive decision.

62. Accordingly, and in our view correctly, Mr Eadie submitted that the public interest balancing exercise to be performed:

- i) involves a consideration of the impact of a “yes” or a “no” answer to the question whether or not the CO holds information that discloses that the Cabinet or Cabinet committees were involved in the process of making the decision to commence the military air campaign against Serbia and Kosovo in March 1999. And so a consideration of the process adopted to make that decision or the level at which it was made, and
- ii) does not involve a consideration of the impact of disclosure of the discussions in Cabinet or Cabinet committee that led to the making of that substantive decision or of the reasons for it (to the extent that they have not been placed in the public domain).

63. Mr Eadie pointed out that neither the Cabinet Manual of 2011 nor an equivalent predecessor existed at the time that the decision to commence military action against the Serbian authorities was taken in 1999 and so its existence did not mean that he started “30 love down”. That manual states:

“Issues for Cabinet

There are no set rules about the issues which should be considered by Cabinet itself and it is ultimately for the Prime Minister to decide the agenda, on the advice of the Cabinet Secretary. Cabinet and Cabinet committees can all take collective decisions and the level of the committee which a decision is taken should not be disclosed. However, the following is an indication of the kind of issues that would normally be considered by Cabinet:

- decisions to take military action
- ...”

64. As pointed out by the AG witness the sentence introducing the examples gives an “indication” as to what would “normally” be considered by Cabinet and so provides for flexibility. We also accept the submission that in 1999, and indeed now, a decision to take military action is an exercise of the prerogative and the manner in which it is to be taken is a matter for the Government of the day and that in 1999 there would be nothing democratically surprising if the decision had not been made by or in accordance with a conclusion reached in Cabinet or Cabinet committee.

65. The passage that the level of the committee at which decisions are made should not be disclosed finds a mirror in the Law Officers Convention not to disclose whether or not the Law Officers have given advice. Naturally, it would have been contradictory for Mr Eadie to have relied on this part of the manual and he realistically accepted that it can be said that, outside the realm of FOIA, both approaches have from time to time been honoured in the breach. Indeed, it is common knowledge, and we suggest inevitable, that the public are regularly informed that a Cabinet committee has been convened to address particular issues and so, when this is done, that this “cat is out of the bag”.

66. We agree, as submitted:

- i) that the request relates to a specific decision to commence military operations with the consequence that if the CO had confirmed that it held Cabinet minutes relating to that decision it would by so doing have disclosed the subject matter of the discussions recorded in those minutes of Cabinet or a Cabinet committee, and so the agendas for those meetings, but nothing more of the contents of any such minutes, and
- ii) that it was and remains a matter for the Government of the day to determine the process to be applied to its decision-making and thus the level at which decisions should be discussed and made.

67. Mr Eadie directed and limited his NCND submissions to decisions reached at, or founded on discussions at, Cabinet or at a Cabinet committee. He acknowledged that different considerations may apply at lower levels of government decision-making (eg one made by a Secretary of State personally or by a Minister personally or by an official on their behalf applying the *Carltona* principle). As all are Government decisions on which the Government speaks with one voice collective responsibility is engaged. We add that it was accepted by the AG witness that one of the functions of the Law Officers is to advise on inter-departmental differences to determine the Government's approach and so its one voice.

68. At the level he was addressing, Mr Eadie submitted that there was no democratic deficit in keeping the public in ignorance of whether the chosen process for a Government decision included Cabinet or Cabinet committee discussions and decisions. He argued that this was because the Government had to explain and defend its decision as a matter of substance whether or not the Cabinet or a Cabinet committee had been involved and it was the substance that mattered.

69. His argument (which we shall refer to as his distraction argument) came down to the following points:

- i) that as it was the substance of the reasons for a decision that mattered disclosure of and debate as to whether the Cabinet or Cabinet committee had or had not been involved would be a distraction and so damage effective decision-making,
- ii) that unless an NCND response was made to requests for Cabinet minutes the response to a request for them (and so to the request for information discussed at Cabinet) would reveal in each case what was discussed at the relevant meetings (and so on their agendas) over the relevant period and this would give rise to that distraction and damage,
- iii) that unless an NCND response was generally made to requests for Cabinet minutes (and so for the information discussed at Cabinet) over time the way in which the Government of the day decided what process or level of decision-making merited Cabinet or Cabinet committee involvement would be revealed and this would give rise to that distraction and damage.

70. Correctly, in our view, this argument:

- i) Accepts that the relevant public interests relate only to the impact of the disclosure of the process or level of decision-making and so only to the introduction of debate as to why or why not matters were discussed at Cabinet prompted by a "yes" or a "no"

answer to the question whether or not the CO holds information that discloses that the Cabinet or Cabinet committees were involved in the decision-making process.

- ii) Recognises that the information that derives from a “yes” or “no” answer only discloses the topic discussed and does not disclose the contents of the arguments and views expressed or the material supplied to the meeting or who was present at the meetings or their dates unless the request is directed to particular days rather than a period.
- iii) Abandons reliance on assertions of damage to the public interest based on the existence and importance of the collective responsibility of the Cabinet.
- iv) Abandons arguments that disclosure of the process adopted and so the level of decision-making and discussion of it would ultimately be corrosive of Parliamentary democracy. When this was put to the AG witness she was unable to explain it. This is not a criticism because in our view it is unsustainable.
- v) Abandons the baffling argument that a failure to take an NCND approach would or would be likely to put unnecessary burdens on the most senior levels of decision-making. As to that, the AG witness unsurprisingly pointed out that at lower levels it would be explained to the relevant person that he or she should not pass certain matters up the chain and she did not demur from our point that a Secretary of State who regularly sought to involve Cabinet when this was not appropriate would or should not last long in office and in the Cabinet.
- vi) Abandons the linked arguments based on the introduction of debate concerning the confidence of a Minister in his own judgement or whether his colleagues would support, or would have supported, him.
- vii) Recognises that the protection NCND gives against the disclosure of the contents of discussions between those involved in a decision in the sense of what they considered and their exchange of views and arguments is only a pragmatic consequence of its application and not a reason for it.

The point in sub-paragraph (vii) is important because unless it is recognised an impermissible contents argument is introduced at the NCND stage.

71. It seems to us that this impermissible approach was being taken (a) in paragraph 16 of the cited CO statement, and (b) in the reliance placed on collective responsibility because both are founded on harm arising from disclosure of the contents of Cabinet discussions and not on simply whether a topic or topics was or was not discussed at Cabinet.

72. We acknowledge that the distraction argument advanced by Mr Eadie has some force. But we are troubled that the points he abandoned had been advanced as being relevant to the section 2(1)(b) balance. This abandonment of arguments and reasoning advanced by a senior civil servant on public interest arguments relating to government decision-making undermines an approach that generally they take a balanced and properly reasoned approach to such points.

The balance of the competing public interests

73. In our view the public interest is strongly in favour of the CO having to disclose whether it holds the information sought (ie Cabinet minutes) and thus the process of decision-making in

respect of the decision to commence the military air campaign against Serbia and Kosovo on 24 March 1999.

74. It seems to us that the force of the distraction argument will change over time.

75. We record that in our view the abandoned points that regular disclosure of the level at which government decisions are made will (a) cause harm to current and future Government decision-making by putting unnecessary burdens on the most senior decision-makers (or, we add inappropriate more senior decision-makers) and (b) prompt debate on the confidence of a Minister of his or her support from colleagues, have no weight. Generally disclosure of information about a decision taken by Government will disclose the process applied in making it and so the level of the decision-makers and so it seems to us that:

- i) if this problem exists at lower levels of decision-making examples could be given. They were not, and
- ii) at higher levels of decision-making and responsibility it would be very troubling if those involved reacted in the way suggested.

76. Whilst a decision is being taken the distraction argument in respect of the process being adopted, and so the level of decision-making, can be said to be an aspect of a wider “safe space” argument that the decision-makers should be allowed to get on with their decision-making without interference. And, in this context, during and after the decision-making process the distraction argument may have the added force that debate about process, rather than the substance of the issues relevant to the decision, would be an irrelevant diversion because what will matter is the force of the reasons for the decisions based on the matters and arguments taken into account in making it.

77. Once a decision has been taken the weight of both of the competing arguments will be affected by the passage of time.

78. Generally, we consider that transparency in respect of the process of Government decision-making is in the public interest because it promotes good government. This was recognised by Mr Eadie. It is also recognised, for example, by the 2011 Cabinet Manual which recognises the obvious point that the more important and the more potentially far reaching decisions should be made at an appropriately high level.

79. The decision to commence a military air campaign is clearly an important and potentially far reaching decision that will inevitably have very serious consequences and, in our view, there is a strong public interest in knowing the level of Government at which such an important decision was made.

80. Generally, in our view the passage of time since the decision was made weakens the force of the public interest founded on the distraction argument more than the force of the public interest in knowing the level at which important decisions were made.

81. Further, in this case at the time that the CO Request was made and the NCND response was given there was considerable public interest in the process applied to the making of decisions to commence and more generally in respect of military action in connection with Iraq. They were a part of the then ongoing Chilcot Inquiry. This strengthens the general point made in the last paragraph by providing a current public interest in knowing the level at which a decision to take

military action had been made in the past to inform debate about how, and so at what level, they should be made in the future.

82. It seems to us that:

- i) an answer confirming that Cabinet minutes are held by the CO which record information within the ambit of the CO Request (and so a “yes” answer) is what would be expected and would lead to the balancing exercise required by section 2(2)(b) of FOIA as to the contents of that information, and
- ii) an answer that no such Cabinet minutes are held (and so a “no” answer) would further the public interest by giving rise to discussion as to why that was so and so whether the process then adopted was appropriate or whether lessons should be learnt from it.

83. Put another way, it seems to us that it is not in the public interest for NCND to be applied to preclude the exercise required by section 2(2)(b) of FOIA being determinative of the disclosure of Cabinet minutes or, if there are none, the information in documents recording the manner in which the decision to commence the military air campaign was taken.

84. This conclusion means that it is unnecessary for us to examine whether the NCND response is precluded by the extent and nature of the information in the public domain relating to the existence of relevant discussions in Cabinet or Cabinet committee, or whether as the appellant asserted there is inconsistency between information put in the public domain about this which supports the rejection of the NCND response. No such arguments were advanced in respect of the NCND based on section 23(5) and section 24(2).

The NCND response based on section 23(5) and 24(2) of FOIA

85. The appellant asserted in her Reply that the Commissioner had taken an extremely broad approach to these sections but did not pursue this in written or oral argument or otherwise set out why she asserted it founded an error by the Commissioner. She has also asked for a list of every security body that was involved and when it was involved without explaining why that would not be covered by the absolute exemption in section 23(1), although at the hearing she orally asserted that this absolute exemption did not apply because the military action in Kosovo did not concern UK national security without linking this submission to the wording of section 23(1) and (3). It has therefore not been clear to us or the other parties what the appellant’s case on this NCND response is save that her public interest arguments and her point made orally at the hearing about the impact on UK national security extended to the application of section 24(2).

86. Section 23(5) (with the words that are not included in section 23(1) emphasised) provides that:

“(5) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1 (1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).”

87. In our view this is the operative provision and separate consideration of section 2(1)(a) is not needed. Rather, section 2(1)(a) simply makes it clear that no public interest exercise arises if and when section 23(5) is satisfied.

88. As in the case of section 35(3), the NCND provision in section 24(2) simply triggers the distinct test, and so the public interest balance, defined by section 2(1)(b).

89. Accordingly, when an NCND based on section 24(2) is advanced there is a need to consider the impact of a “yes” and a “no” answer to a response that information that engages section 24 is held. This does not involve assessing the strength of the public interest that underlies disclosure of the contents of any such information. Rather, what matters is the establishment of how an answer that states whether or not requested information is held will harm national security. This is a different route to the establishment of that harm but if and when it exists there is a strong public interest in avoiding it.

90. The letter from the CO dated 14 October 2013 (with our emphasis) says this about the NCND response based on section 23(5) and section 24(2):

“In reliance on the exclusions in sections 23(5) and 24 (2) of the Freedom of Information Act, which relates to bodies dealing with security matters and national security, **I can neither confirm nor deny whether any of the information held is subject to the exemptions at section 23(1) or 24(1) of the Act. To confirm or deny whether this was the case would involve the disclosure of exempt information.** The exclusion at section 23(5) is an absolute exclusion. The exclusion in section 24 is a qualified exclusion and the Cabinet Office has considered whether the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in confirming whether or not the Department hold any **further information.** The Cabinet Office recognises that there is a general public interest in openness in government because this increases public trust in an engagement with the government. These public interests have to be weighed against a very strong public interest in safeguarding national security. This interest could only be overridden in exceptional circumstances. I have determined that in all circumstances of the case, the public interest in maintaining the exclusion outweighs the public interest in confirming or denying whether any information is held beyond that covered by the above exemptions”

91. This makes the NCND response in respect of “further information” and so information other than that which in response to the request it has confirmed it holds and in respect of which it has claimed exemptions. It does not appear to rely on section 23(5) or section 24(2) in respect of Cabinet minutes.

92. As with the letter giving an NCND response in respect of Cabinet minutes this letter is overtaken by the reasoning in the CO Decision. But it seems to us that the first two sentences we have highlighted are muddled and do not contain a clear explanation of:

- i) how it is asserted that section 23(5) applies, or
- ii) how it is asserted a “yes” or “no” answer to the request would harm national security.

Rather the second highlighted sentence is to the effect that an answer as to whether requested information was held would disclose exempt information which engages section 23(1) and/or section 24(1) and so particularly in the case of section 24(2) misses the point. In the CO Decision, the Commissioner addresses the ambit of section 23(5) and 24(2) and concludes that they are engaged.

93. As to the application of section 23(5) and section 24(2) the Commissioner said:

“62. There is clearly a close relationship between the public authority and the security bodies. In the light of the public authority’s relationship with the security bodies and the nature of parts of the request, the Commissioner finds that, on the balance of probabilities, some of the requested information, if held, could relate to or have been supplied by one or more bodies identified in section 23(3) FOIA.

63. With regard to section 24(2), the Commissioner again considers that this exemption should be interpreted so that it is only necessary for a public authority to show either a confirmation or denial of whether requested information if held would be likely to harm national security. ...

64. In relation to the application of section 24(2) the Commissioner notes that the First Tier Tribunal (Information Rights), has indicated that only a consistent use of a ‘*neither confirm nor deny*’ (NCND) response on matters of national security can secure its proper purpose. Therefore, in considering whether the exemption is engaged, and the balance of the public interest test, regard has to be given to the need to adopt a consistent NCND position and not simply to the consequences of confirming whether the specified requested information in this case is held or not.

65. As a general approach the Commission accepts that withholding information in order to ensure the protection of national security can extend, in some circumstances, to ensuring that matters which are of interest to the security bodies are not revealed. On this occasion the Commissioner is satisfied that compliance with the requirements of section 1(1)(a) would be likely to reveal whether or not the security bodies were interested in the subject matter of the relevant part of the request. The need for the public authority to adopt a position on a consistent basis is of vital importance in considering the application of an NCND exemption.

66. The Commission is satisfied that the public authority is entitled to rely on both sections 23(5) and 24(2) in the circumstances of this case. He accepts that revealing whether or not information is held within the scope of the request which relates to security bodies would reveal information relating to the role of the security bodies. It would also undermine national security and for that reason section 24(2) also applies because neither confirming nor denying if information is held is required for the purpose of safeguarding national security.

(On the balance of the public interest)

72. However, the Commissioner accepts that the public interest in protecting information for the purposes of safeguarding national security is a very strong one. The humanitarian crisis leading up to the NATO airstrikes is well documented so the public is largely aware of the rationale for the intervention. Issuing a confirmation or denial in respect of whether any relevant information requiring exemption for the purposes of safeguarding national security is held by the authority would not, in the Commissioner’s view, significantly increase the public’s knowledge of the factors that led to the airstrikes.

The Commissioner finds that in the circumstances of this case the public interest in protecting information for the purposes of safeguarding national security outweighs the public interest in favour of confirmation or denial.”

94. In her submissions counsel for the Commissioner summarised and repeated this reasoning and did not add to it. No evidence or further reasoning was relied on by the CO on either (a) why section 23(5) applied, as opposed to the absolute exemption in section 23(1) from the duty to provide requested information, or (b) the public interest balance in respect of section 24(2). So the CO, like the Commissioner, relied on the reasoning on the CO Decision.

95. We did not hear or invite any detailed argument on that reasoning. And in the absence of such argument we are not satisfied that:

- i) it addresses the test set by section 23(5) correctly,
- ii) it addresses the test set by section 2(1)(b) and so section 24(2) correctly, and
- iii) it provides adequate reasons for the conclusion reached.

96. What follows in paragraphs 98 to 101 are points that we consider merit argument.

97. We acknowledge that the reasoning of the CO Decision is in large measure based on the guidance given by the Commissioner on the application of sections 23 and 24 and so that our conclusion is that such guidance merits consideration with the benefit of argument.

98. The approach to be taken to deciding whether section 23(5) or section 23(1) applies and the following questions merit such consideration:

- i) why does a conclusion that it is more likely than not that, by its nature, the requested information will include information concerning the involvement or otherwise of one or more of the section 23(3) bodies mean that section 23(5) rather than section 23(1) applies?
- ii) is the opposite the case because that conclusion on likely involvement or otherwise means that compliance with section 1(1)(a) will not involve the disclosure of any of the information referred to in section 23(1) and section 23(5)?
- iii) is section 23(5) confined to a situation in which the section 23(3) bodies may or may not be involved and disclosure of which is the case would provide information (or is that situation left to section 24(2))?
- iv) is the approach taken by the Commissioner to the “engagement” of section 23 correct in the context of an NCND response, having regard to the point that the test in section 23(5) is whether compliance with section 1(1)(a) would involve the disclosure of information?
- v) does information that indicates that section 23(3) bodies were not involved “relate” to those bodies?
- vi) what is the meaning and significance of the words “whether or not already recorded” in section 23(5)?

99. In connection with the application of both sections 23(5) and 24(2), we consider that the following points merit consideration with the benefit of oral argument:

- i) are these provisions mutually exclusive or do they overlap?

- ii) can they overlap if, as seems to be the Commissioner's position, sections 23(1) and 24(1) are mutually exclusive?
- iii) how should sections 23(5) and 24(2) be applied together?
- iv) how is the extent of the information to which the NCND response is given to be determined and so how is any information within the ambit of the request that does not merit an NCND response to be identified, and dealt with under FOIA?

100. In connection with the application of section 24(2), we consider that the following questions merit consideration with the benefit of oral argument:

- i) is there a need to consider whether section 24(1) is or might be engaged when the test is whether an exemption from the duty imposed by section 1(1)(a) is required for the purpose of safeguarding national security?
- ii) does the reasoning in the CO Decision adequately explain why a confirmation or a denial (and so a "yes" or "no" answer) to whether the CO holds information within the ambit of the request would harm national security and so why an NCND would safeguard national security?
- iii) whether the reliance on consistency is adequately explained, and
- iv) whether the assertion that there is a strong public interest in safeguarding national security is enough without explaining its force now in the context of NCND.

101. We therefore see some force in the generic assertion of the appellant that the Commissioner and the CO have taken an impermissibly broad approach to the NCND response based on section 23(5) and section 24(2).

102. However, it would clearly not be fair for us to decide this part of the appeal against the Commissioner and the CO without giving them the opportunity to address us further.

Conclusions on the NCND responses

103. As appears later we have concluded that the exemptions claimed in respect of the Disputed Information within the scope of the CO Request mean that it does not have to be disclosed. In doing so we have decided that the public interest arguments in favour of disclosure advanced by the appellant do not merit disclosure in the public interest. As mentioned earlier there is an obvious overlap between the public interest arguments we have considered and those that would arise in respect of the contents of any Cabinet minutes.

104. We have decided that an NCND response in respect of the appellant's request for Cabinet minutes cannot be based on section 35(3) because the public interest in maintaining the NCND exclusion does not outweigh the public interest in disclosing whether the CO holds any such minutes. This means that the CO must reconsider the CO Request on that basis.

105. As we have pointed out, the way in which the NCND responses and the arguments on them were advanced did not address whether and if so why the NCND response based on section 23(5) and section 24(2) extended to any Cabinet minutes. However, in the light of our finding that the CO cannot rely on section 35(3) to NCND the existence of Cabinet minutes, we require the CO and the Commissioner to make plain their respective stances as regards reliance on

section 23(5) and/or section 24(2) in respect of such minutes. In doing so, they should bear in mind that whilst, by their nature, the minutes (if they exist) may well include information concerning the involvement or otherwise of one or more of the section 23(3) bodies, any attempted reliance on section 23(5) and/or section 24(2) to NCND the existence of Cabinet minutes will need to engage with the point made at paragraph 70(ii) above.

106. In other words, it needs to be considered why an NCND response is appropriate in the context of information that is contained in all documents or other material apart from and/or including those provided on a closed basis.

107. The need for this consideration finds our view that the most sensible course is for the CO to reconsider whether it should give an NCND response on the basis that it cannot rely on section 35(3) and that, if it decides to do so, it should explain why that response is justified more fully than it has done thus far. In giving that explanation it will have to decide how the reasons for it are to be presented and thus what, if any, of the explanation should be given on a closed basis with or without reference to the contents of documents that the CO has provided to the Commissioner on a closed basis.

108. What we have just said assumes that the appellant will wish to continue her appeal in respect of the issue of the Cabinet minutes, at least until she knows the stance of the CO and the Commissioner in the light of our decision that they cannot rely on section 35(3).

109. In the circumstances, it seems to us that the most practicable course in relation to the CO Request is to hold a case management hearing, after the parties have had an opportunity to read this decision in draft, at which the decision will be handed down and directions can be made regarding the section 23(5)/24(2) issues.

The application of section 27(1) to the CO Request

110. The Commissioner concluded in the CO Decision that the CO was entitled to rely on section 27(1) in respect of the information within the scope of the request and contained in all but one of the documents making up the Disputed Information (the section 27 Documents). As to the one remaining document the Commissioner concluded that it need not be disclosed because the exemption in section 42 applied to the information in it that was within the scope of the CO Request (the section 42 Document). The reasons for that conclusion of the Commissioner are set out in a confidential annex to the CO Decision.

111. In our view, there was no need for us to consider the reasoning in the confidential annex for that conclusion because we have dealt with the appeals on the basis that only the section 42 exemption applies to the section 42 Document (see our decision in the appeal against the AGO Decision). We were not invited to consider that reasoning at the hearing. Indeed that annex was not included in our papers for the hearing.

112. We have read the Disputed Information. The application of section 27(1) to the section 27 Documents is self-evident and requires no further explanation to anyone who has read them. It is also self-evident to a reader of the section 42 Document that section 42 applies to it. We shall deal with the section 42 Document in our decision on the AGO Request (see paragraph 133 below).

113. A further open explanation is not necessary or practical without disclosing the content of the Disputed Information. In any event, the engagement of the exemptions as found by the Commissioner was not disputed on this appeal.

The prejudice referred to in section 27(1) and the section 2(2)(b) public interest balance

114. The prejudice identifies the public interest against disclosure and its weight in the particular case has to be weighed on a contents basis with the weight of the public interest arguments in favour of disclosure.

115. As we have already mentioned, before us the public interest arguments against disclosure were all put in open evidence and submission.

116. These arguments are primarily set out in the first statement from the CO deponent and the CO witness gave oral evidence about them. In contrast to the evidence directed to the NCND responses this evidence contained balanced and cogent reasoning on the likely reactions of other states and in particular of the USA and Serbia to disclosure of the Disputed Information contained in the section 27 Documents. It must be remembered that what is relevant is an assessment of those reactions rather than of the validity of the reasons for them looked at through “English or any other eyes”. In this area there is authority to the effect that the courts and tribunals should attach weight to the views of the government expressed through Secretaries of State, Ministers or senior civil servants because of their relevant experience and expertise in assessing such reactions (see for example *APPGER v IC and FO* [2011] UKUT 153 (AAC) and the cases cited at paragraph 56 of that decision). We accept that approach and comment that the nature of the written and oral reasoning on it in this case reflected its foundations.

117. That reasoning recognised and addressed the point that the relevant exchanges took place a long time ago and that this reduced both the risk that disclosure would cause damage and the extent of any damage if the risk materialised.

118. In connection with the very important relationship between the USA and the UK that reasoning repeated points that were accepted in the decision of the Upper Tribunal in *APPGER v IC and FCO* [2015] UKUT 377 (AAC) that release of diplomatic material would cause an intelligence sharing risk and thus a real risk of a further reduction in the flow of intelligence. In doing so in that case the Upper Tribunal accepted that this risk had materialised as a reaction to the disclosure that was ordered in the *Binyam Mohamed* case.

119. It was recognised that the material in this case was less sensitive but it was pointed out that it would be regarded by the USA as diplomatic exchanges that should be kept confidential and that as it related to military operations and it had particular sensitivity.

120. We accept the conclusion, and analysis leading to it, that the long standing attitude of the USA and its more recent reaction in the context of the *Binyam Mohamed* case means that that there is real risk of damage to the relationship between the USA and the UK if the Disputed Information within the ambit of the CO Request material was disclosed in this case. We also accept that if that risk materialised it would have detrimental effects on the full and free exchange of information between the UK and the USA and that given the importance of maintaining and promoting such exchanges those detrimental effects would cause significant harm in the short and longer term.

121. We also accept that an approach to the USA to ask if it would object would give rise to the same risk because the likely reaction of the USA to such a request would be that because it has made its position clear it regarded such a request as an indication that the UK authorities and courts were not taking or would not take that view fully and properly into account and so such exchanges were at an unacceptable risk of being disclosed.

122. We also accept that the ongoing efforts to build a relationship between the UK and Serbia mean that the passage of time has not reduced the sensitivity of the Disputed Information contained in the section 27 Documents in that context and that the impact of disclosure on those efforts would be likely to be damaging to this exercise because it would be used by those who oppose it (and so oppose the foreign policy of the UK of seeking to build an improved relationship between the UK and Serbia) to re-visit the roles of the UK and NATO in the Kosovo conflict. We also accept that for the same reasons such risk of damage extends to relationships between Serbia/Kosovo/NATO/EU.

123. Accordingly, we accept that there are real risks in the sense of ones that cannot sensibly be ignored that disclosure of the Disputed Information contained in the section 27 Documents will harm (a) the relationship of the UK with the USA and that the importance of that relationship means that any such damage could be serious and (b) the relationship of the UK with Serbia (and relationships between Serbia/Kosovo/NATO/EU) and that any such damage would have an impact on the UK's policy in respect of those relationships.

124. This reasoning and conclusion applies to all of the information within the scope of the CO Request that is contained in the section 27 Documents.

125. The public interest in favour of disclosure is founded on the public interest in openness and in understanding and evaluating on an informed basis the reasons for decisions made by the government and its formulation of foreign policy.

126. In this case, as accepted by the CO (and the AG), the nature of the decision to start a military campaign and its consequences mean that there is a strong public interest in knowing as much as possible about why the decision was taken and so the factors that were taken into account.

127. However, we agree with the Commissioner that the extent of the material already in the public domain weakens the strength of this public interest more than the public interest against disclosure. In our view, this is because the extent of that material provides information and the Disputed Information in the section 27 Documents adds little to it, whereas its disclosure directly triggers the public interests against such disclosure.

Conclusion on the balancing exercise

128. In our view, the public interest balance in respect of section 27(1) is firmly in favour of the conclusion that the Disputed Information in the section 27 Documents should not be disclosed.

Conclusion

129. We agree with the Commissioner that in the public interest the CO can refuse to disclose the section 27 Documents and so the information contained in them.

Overall summary

130. The CO Decision is not in accordance with the law, to the extent that section 35(3) of FOIA did not entitle the CO to NCND whether it held Cabinet minutes, within the scope of the appellant's request. The appellant's appeal is, accordingly, allowed to that extent.

131. The CO Decision is in accordance with the law, to the extent that the first respondent was right to conclude that (save as regards the section 42 Document: see paragraphs 111 and 112 above), the public interest in maintaining the exemption in section 27 outweighs the public interest in disclosing the information within the scope of the appellant's request. The appellant's appeal is, accordingly, dismissed, to that extent.

132. The appeal in respect of the asserted application of sections 23(5) and 24(2) to the CO is the subject of further directions (see paragraph 5 of the Decision).

133. The appeal in respect of the AGO Request and the section 42 Document will be the subject of a separate decision of the Tribunal (see paragraph 6 of the Decision).